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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 955

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as PUBLIC AFFAIRS PRESS, *Petitioner*

v.

VICE ADMIRAL HYMAN G. RICKOVER, *Respondent*

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

VICE ADMIRAL HYMAN G. RICKOVER, *Respondent*

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Hyman G. Rickover, Respondent, respectfully requests that if the Petition for a writ of certiorari filed herein on January 14, 1961, by Public Affairs Associates, Inc. be granted, the order entered to that effect provide for a review of that part of the judgment of the United States Court of Appeals for the District of Columbia Circuit which held that Respondent's speeches prior to December 1, 1958, not individually copyrighted, were dedicated to the public domain by Respondent's acts of distribution. If the said Petition be denied, as Respondent believes it should be, Respondent respectfully requests that this Cross-petition be deemed withdrawn.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 284 F.2d 262 and is set forth as Appendix A to the Petition (p. 30-47).

The opinion of the United States District Court for the District of Columbia is reported at 177 F. Supp. 601 and is set forth in the Brief for Appellant and Appendix Below (p. 54).

The judgment of the court below as filed October 20, 1960, and as set forth as Appendix B to the Petition (p. 48), was modified by an order of the United States Court of Appeals for the District of Columbia Circuit dated January 17, 1961, to provide that each party bear its own costs. A copy of that order, as filed January 17, 1961, is set forth herein as Appendix 1 (p. 17, *infra*).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF QUESTION PRESENTED

In the opinion of Respondent the question presented by the Petition is:

Whether the Respondent, a Vice Admiral of the United States Navy, is entitled to own certain literary material—speeches prepared for oral delivery—written and delivered orally by him otherwise than as part of his regular duties and not pursuant to official assignment of any kind.

QUESTION PRESENTED BY THIS CONDITIONAL CROSS-PETITION

Whether the Respondent lost his rights in some of the speeches by certain acts of distribution,—performance and distribution to reporters and a limited group of individuals,—at the time of oral delivery, of copies which he had caused to be made, through the use of government facilities, in the form of press releases bearing no notice of copyright.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U. S. Constitution, Article I, Section 8, clause 8.

The Congress shall have Power * * *;

* * *

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

* * *

2. The Copyright Law, 17 U.S.C.

§ 1. Exclusive rights as to copyrighted works—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

* * *

§ 2. Rights of author or proprietor of unpublished work—Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

§ 4. All writings of author included—The works for which copyright may be secured under this title shall include all the writings of an author.

§ 8. Copyright not to subsist in works in public domain, or published prior to July 1, 1909, and not already copyrighted, or Government publications; publication by Government of copyrighted material—No copyright shall subsist in the original text of any work which is in the public domain, * * * or in any publication of the United States Government, or any reprint, in whole or in part, thereof: * * *

§ 10. Publication of work with notice—Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; * * *

§ 12. Works not reproduced for sale—Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; * * *. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections 13 and 14 of this title, where the work is later reproduced in copies for sale.

3. The Printing Law, 44 U.S.C.

§ 58. Sale of duplicate plates; copyright.—* * * No publication reprinted from such stereotype or electrotype plates [from which any Government publication is printed] and no other Government publication shall be copyrighted.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case sets forth, as facts, conclusions which were flatly rejected by the Trial Court and by the Circuit Court. The relevant facts are as follows:

1. Petitioner is a book publisher.

2. Respondent is a Vice Admiral of the United States Navy on active duty as Assistant Chief of the Bureau of Ships for Nuclear Propulsion, and is Assistant Director for Naval Reactors, Division of Reactor Development, U. S. Atomic Energy Commission.

3. Since October 20, 1955, Respondent has occasionally delivered speeches on matters of public interest. Respondent's speeches were written and deliverd by him of his own volition and not as part of his official duties (177 F. Supp. 601, 604; 284 F.2d 262, 269).

4. Prior to January 16, 1959, the date of commencement of this action, Respondent delivered twenty-three speeches.

(a) None of the first twenty-two was copyrighted at the time it was distributed by Respondent in written form.

(b) The twenty-third speech, that prepared for delivery on December 11, 1958, bore a notice of copyright and was deposited in the Copyright Office on December 1, 1958, with an application for registration.

5. Since January 16, 1959, each speech made by Respondent, with one exception, has been individually copyrighted.

6. The speeches were not official publications (284 F.2d at 269, 177 F.Supp. at 604).

7. The speeches were all written by Respondent in longhand on such of his time as is his own. None of them was written at the office. A large part of the speeches was typed by Respondent's wife at home. The typewritten material plus some handwritten portions were brought in to the Respondent's office for the typing of a final copy and the preparation of a multilith master by the Respondent's secretary. In some cases the master was prepared directly from the typewritten copy as brought in from home. All of the speeches were multilithed on government duplicating machines.

8. The speeches were distributed in limited number to the press and to individuals who had requested copies or who Respondent believed would be interested in the subject.

9. Respondent's speeches as prepared for distribution bore his name, his rank in the United States Navy and his title in the Atomic Energy Commission. The speeches as distributed customarily bore a statement "for release", giving the date and frequently the time of the release, and with few exceptions were on the paper stock used for press releases by the Department of Defense or the Atomic Energy Commission.

10. Respondent is required to do a substantial amount of traveling and did not take leave of any kind in connection with the trips during the course of which he made the speeches. He was able to conduct government business at or near the location in which a speech was to be given, and arrangements were made to make the speeches in free or "off duty" hours. The transportation in every instance was provided by the government.

11. Each of Respondent's speeches was submitted to the Department of Defense, Office of Security Review, in advance of its release. No objection thereto was received, and each of them was returned to Admiral Rickover bearing the stamp of the Office of Security Review, reading as follows:

"NO OBJECTION TO PUBLICATION ON GROUNDS OF MILITARY SECURITY.

(Here date was stamped)

OFFICE OF SECURITY REVIEW (OASD L & PA) DEPARTMENT OF DEFENSE."

12. On or about October 29, 1958 Petitioner advised Respondent that it desired to publish Respondent's speeches in book form and Respondent indicated he would not grant Petitioner's request for permission to publish them.

REASONS FOR DENYING THE WRIT

I. The Petition presents questions of fact rather than law.

This case has been decided, as it should have been, on its own particular facts.

The facts were determined by the District Court to support Respondent with respect to the basic question presented—that of ownership of the speeches on their creation—and the Court of Appeals found unanimously in favor of Respondent on this question.

Specifically, the District Court found that Respondent's speeches are in the group of "literary products of a Government officer or employee that have some bearing on, or that arise out of his official actions, although writing the book or delivering the address in question, is no part of his official duties." (177 F. Supp. at 604).

The Court of Appeals unanimously reached the same conclusion and set forth the findings of fact as follows (284 F.2d at 265-266):

> "The agreed statement of facts shows that the writing of these speeches was done at home after normal working hours or while traveling. It was agreed:
>
> 'The speeches were written by the Admiral in longhand. A large part of the speeches were typed by Mrs. Rickover at home. The typewritten material plus some handwritten portions were brought in to the Admiral's office for the typing of a final copy and the preparation of a multilith master by the Admiral's secretary. In some cases the master was prepared directly from the typewritten copy as brought in from home. All of the speeches were multilithed on Government duplicating machines.
>
> * * *
>
> 'The defendant admits that it was his practice to have his speeches as prepared for distribution bear his name, his rank in the United States Navy and his title in the Atomic Energy Commission, that the speeches as distributed customarily bore a statement 'for release' giving the date and frequently the time of the release and with few exceptions were on the paper stock used for press releases by the Department of Defense or the Atomic Energy Commission.'
>
> After multilithing and at or before delivery, all speeches except Nos. 7 and 12 in footnote 3, supra, were distributed. The statement of agreed facts shows as follows:
>
> 'Certain of the speeches, approximately sixteen in number, were also made available to the press through the Public Information Office of

the Department of Defense or of the Atomic Energy Commission, or both. In distributing the speeches, Admiral Rickover mailed some to individuals who had requested copies or who[m] Admiral Rickover believed would be interested in the subject. Some were sent by Admiral Rickover, approximately 50 in each case, to the sponsor of the speech to be made available to the press and others at the place where the speech was to be delivered. Some speeches were sent to the Press Club in Washington by Admiral Rickover for the use of representatives of the press.'

"Each speech was cleared by the Department of Defense, Office of Security Review. This was done under § 1252 of the General Regulations of the Navy which, inter alia, provide:

'3. Persons in the naval service desiring to publish articles on professional, political, or international subjects in accordance with the provisions of this regulation shall cause their signatures to appear on such articles, together with a statement to the effect that the opinions or assertions contained therein are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large. Immediately upon the acceptance of such articles for publication, the writer shall forward a complete copy of such articles to the Secretary of the Navy for the files of the Navy Department.'

There was also a Department of Defense Directive in effect during the time the speeches were delivered.[4]

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[4] "V. *Writing for Publication by Defense Personnel as Individuals.* Personnel of the Department of Defense, military and civilian, who write for outside publication not in connection with their official duties on any subject or in any form shall ascertain that such activity will not interfere or

"Admiral Rickover had duties of supervision and inspection that could be carried out at or near the various points of delivery, and arrangements were made to make the speeches in free or 'off duty' hours. No transportation costs were paid by Admiral Rickover in connection with his addresses. Honoraria, when offered, were paid directly to charities specified by the Admiral.

"The District Court in its opinion determined that the addresses listed in note 3 fell into a class of literary productions 'that arise out of [the author's] official actions, although writing the book or delivering the address in question, is no part of his official duties.' * * *"

This Court should not be called upon to examine the facts in this case still another time. The finding of all four judges who did examine them should be accepted as determinative of the matter and the Petition should, therefore, be denied. *Allen* v. *Trust Co. of Georgia*, 326 U.S. 630 (1946); *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 275 (1944).

II. There is no conflict among Courts of Appeals on the law applicable to the facts concerning the basic question.

On the question of ownership of literary material written by government officials, there is no conflict among Courts of Appeals. The decision in this case is thoroughly in accord with *Sherrill* v. *Grieves*, 57 The

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conflict in any way with their regularly assigned duties. Such activity will not be conducted during normal working hours, or accomplished with the use of Department of Defense facilities, or personnel. Such writers will be on an exact parity with outside professional writers with respect to accessibility and use of technical or other information for manuscripts or articles written for publication. Articles by such personnel, dealing with military matters, will be submitted to the Office of Security Review, OASD (PA), for review and clearance to avoid any possible violation of military security." DOD Directive No. 52,369, Aug. 17, 1957.

Washington Law Reporter 286 (1929), and *First Trust Co. of St. Paul* v. *Minnesota Historical Society*, 146 F. Supp. 652 (1956), *aff'd*, 251 F.2d 686 (1958). All three of them reach the same result on similar ultimate facts.

On the other hand, *Sawyer* v. *Crowell Publishing Company*, 46 F. Supp. 471 (1942), *aff'd*, 142 F.2d 497 (1944), *cert. denied*, 323 U.S. 735 (1944), which found against the private right of copyright ownership claimed by an official of the Department of Interior, was amply justified by the substantially different fact situation there involved. Sawyer appropriated to his own use an extensive amount of government material and scientific information and ordered many weeks of work done on the preparation of a new map under his direction by subordinates of his in government service. The finished map was printed and engraved by the United States Geological Survey, a division of the Department of Interior and bore the legend "Data obtained from official sources, computations on this map verified by the General Land Office." A clear distinction exists between the essential facts in the Sawyer Case on the one hand and those in the Sherrill Case, *supra*, the Lewis and Clark Case (*First Trust Co. of St. Paul* v. *Minnesota Historical Society*, *supra*) and the present case on the other, and a contrary result was called for and does not indicate the existence of a "conflict" between Circuits.

III. There is no conflict with applicable decisions of this Court.

The decision below on the main question is in accord with decisions of this Court in the field of copyright.

This Court has held that while judicial opinions themselves could not be copyrighted the marginal

notes or head notes of the cases and points decided, the abstract of the records and evidence and the index, represented the individual work of the court reporter in which he was entitled to copyright protection. *Callaghan* v. *Myers*, 128 U.S. 617 (1888); *Wheaton* v. *Peters*, 33 U.S. (8 Peters) 591 (1834).

In the field of patents this Court has held in *U.S.* v. *Dubilier Condenser Corporation*, 289 U.S. 178 (1933), *corrected*, 289 U.S. 706 (1933), that two employees of the Bureau of Standards were entitled to patent inventions made by them while employed in the Radio Section of the Bureau notwithstanding their extensive use of government facilities.

Decisions of this Court in the field of torts are not controlling in this situation. The cases cited in the Petition (pp. 8-11) involve officials seeking immunity, claiming that their conduct should be deemed that of the government. This is a substantially different type of question turning on the theory of actual or implied agency with respect to defamatory utterances made by government officials acting within certain areas as a matter of discretion rather than pursuant to orders. It has no application to an official's freedom to create "Writings and Discoveries" on his own time, of his own volition and not pursuant to orders.

IV. This case does not involve any important question of unsettled federal law.

The Petition is predicated solely on the hypothesis that Respondent's actions were official actions. But this question of fact has been decided against Petitioner. Whatever the alleged ambiguity of the term "government publication" (Petition, pp. 16-17) when considered in other contexts, the factual basis for such an issue is not present here.

That the terms "Government publication" in the Printing Law, 44 U.S.C. § 58, and "publication of the United States Government" in the Copyright Law, 17 U.S.C. § 8, are not accompanied by definition facilitating their application to individual situations, would not be cured by further arguing this case. The Copyright Office Study No. 21-C, Copyright in Government Publications, is directed toward possible general revision of the statute. If clarification of the term "Government publication" be needed, and this is not conceded, Congressional action would be required. It would be no answer to the general and sweeping questions sought to be raised by the Petition as to all types of Government publications if this Court were to overrule the District Court and the Court of Appeals on the facts which both found—namely, that the speeches of Respondent were not official publications.

In objecting to the decision below on the ground that, due to the alleged complexity and confidential nature of personnel records, it will not provide an answer to all similar questions which may arise and that it will not defeat alleged attempts to evade the Printing Law and the Copyright Law, Petitioner applies to the wrong forum for relief.

V. This case presents no question of freedom of the press.

Respondent's rights in his speeches are sanctioned by and derived from Title 17, United States Code, which prescribes the conditions on which an author may enjoy exclusive rights in his writings. The authority for the statute is in the United States Constitution, Article I, Section 8, clause 8 and its constitutionality is clear. *Wheaton* v. *Peters*, 33 U.S. (8 Peters) 591 (1834).

An attempt to hide behind the First Amendment disregards the well established principles of the law of copyright which in fact permit the press to be free. The protection of the press lies in the doctrine of "fair use".

Respondent has repeatedly authorized and invited the press to use all or any part of his speeches. However, even if he had not done so the press would be able, under the doctrine of fair use to quote extensively from the speeches. Addresses made by a public official are news and as news can be reported as fully as desired.

The free press is protected by "fair use", but "fair use" does not protect the free rider.

As Judge Washington of the Court of Appeals said in his dissent below,

> "The plaintiff-appellant comes to the courts without having contributed one iota to the work it seeks to appropriate. It has not even gathered and compiled the speeches—on the contrary, it seeks to force Admiral Rickover to collect and present to it copies of all of them. This is a litigation which in its every aspect deserves to fail." (284 F.2d at 273).

REASONS FOR GRANTING THE CROSS-PETITION

The Court of Appeals upheld Respondent as to his right to write, deliver and own his speeches and also as to the formalities observed by Respondent in copyrighting those speeches which he did copyright. However, the Court of Appeals, with one Judge dissenting, reversed the District Court as to the status of the speeches prior to December 1, 1958 not individually copyrighted and held that they had been dedicated to

the public domain by Respondent's "acts of distribution".

The majority considered the "acts of distribution" to be "* * * performance, distribution to the press, the copies sent to individuals at the recipient's request and those sent unsolicited, the copies sent in batches of 50 for distribution by the sponsors of speeches— * * *" (284 F.2d at 271).

In the first place "performance" of a work, or the delivery of a speech, does not operate to dedicate the work under a generally accepted principle of copyright law. *Ferris* v. *Frohman*, 223 U.S. 424 (1912); *Nutt* v. *National Institute, Incorporated*, 31 F.2d 236 (2d Cir. 1929). The introduction of "performance" into the criteria with respect to dedication beclouds the picture.

In the second place the distribution of approximately fifty copies of each speech, clearly identified as press releases, as a matter of law ought not be considered to have been a dedication to the public domain.

The Court of Appeals in this case (284 F.2d at 271) followed the Ninth Circuit Court of Appeals in *White* v. *Kimmell*, 193 F.2d 744 (1952), which is widely at variance with the more recent District of Columbia Circuit decision, *Hirshon* v. *United Artists Corp.*, 100 U.S. App. D.C. 217, 243 F.2d 640 (1957).

White v. *Kimmell* held that a distribution of copies wider in point of numbers than Respondent's and carried out over a long period of time indicated an intention to abandon the rights of the author.

The Hirshon Case, *supra*, in the District of Columbia Circuit held that a much wider distribution of copies did not dedicate.

In the Second Circuit, the United States District Court for the Southern District of New York has held, in *Ilyin* v. *Avon Publications, Inc.*, 144 F. Supp. 368 (1956), that a wide distribution of copies was not controlling in view of the surrounding circumstances.

A rationalization and clarification of the law in this area by this Court would be desirable. It is believed that such a review would lead to a reversal on the question of dedication in this case.

CONCLUSION

For the reasons stated the Petition for a writ of certiorari should be denied but if it be granted this Cross-petition should be granted. If the Petition for a writ of certiorari be denied, Respondent requests that this Cross-petition be deemed withdrawn.

Respectfully submitted,

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February 17, 1961

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 15,463

District Court Civil Action No. 116-59

PUBLIC AFFAIRS ASSOCIATES, INC., Appellant,

v.

VICE ADMIRAL HYMAN G. RICKOVER, Appellee.

Before: Mr. Justice Reed, sitting by designation, and Washington and Danaher, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellee's motion to recall and modify the judgment entered herein October 20, 1960, and of appellant's opposition thereto, it is

ORDERED by the court that the judgment of October 20, 1960, shall be recalled from the District Court and amended by substituting in place of the last paragraph of the order the following:

"It is FURTHER ORDERED by the court that each party shall bear its own costs on this appeal."

It is FURTHER ORDERED by the court that the judgment, as modified, shall be forthwith transmitted to the District Court.

Per Curiam

Dated: January 17, 1961.